Fw: In The Matter Of: Rotary Drilling Supply, Inc., et al - Docket No. RCRA-07-2012-0028

Christopher Muehlberger to: Deborah Bredehoft, Nicole Moran, Delia Garcia 10/24/2012 12:31 PM

Cc: Alyse Stoy, Donald Toensing

MRT's response to the 7003 Order:

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Date: 10/23/2012 03:49 PM
Subject: In The Matter Of: Rotary Drilling Supply, Inc., et al - Docket No. RCRA-07-2012-0028

The attached letter is provided on behalf of Mineral Resource Technologies, Inc. in the above-referenced matter before the United States Environmental Protection Agency.

Regards, Rafe Petersen

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October 23, 2012

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Re: In The Matter Of: Rotary Drilling Supply, Inc., Kleinschmidt Trucking, Inc., Mineral Resource Technologies, Inc., and Union Electric Company d/b/a Ameren - Docket No. RCRA-07-2012-0028

Dear Mr. Muehlberger:

Holland & Knight represents Mineral Resource Technologies, Inc. ("MRT") in the above-referenced matter before the United States Environmental Protection Agency ("EPA"). We are in receipt of EPA's proposed Administrative Order on Consent (hereinafter "Proposed Consent Order") regarding the Rotary Drilling Supply, Inc. property located in Crystal City, Missouri (the "Site").

EPA's Proposed Consent Order was issued under Section 7003 of the Resource Conservation and Recovery Act ("RCRA") and seeks to require the recipients to abate an alleged imminent and substantial endangerment allegedly caused by coal combustion residue ("CCR") deposited at the Site. Our response follows.

In the August 23, 2012 letter transmitting the Proposed Consent Order, EPA requested a response concerning MRT's willingness to enter into settlement discussions. While MRT is willing to enter into settlement discussions with all parties that allegedly deposited material at the Site, the purpose of this letter is to advise EPA of MRT's sufficient cause defense to the Proposed Consent Order to ensure that EPA has a clear understanding of why MRT is not liable for allegedly contributing to an imminent and substantial endangerment under RCRA.

As you are aware from prior discussions and correspondence, we believe that the allegations against MRT are based on numerous factual inaccuracies. In our letter dated February 3, 2012, we explained that MRT could not be held liable for violations of the Clean Water Act ("CWA"), given that MRT neither performed, had responsibility for, nor controlled any of the activity that EPA alleges led to the improper filling of wetlands and streams. Likewise, MRT cannot be held liable under RCRA because MRT was not actively involved in nor did it have control over the handling, storage, treatment, transportation or disposal of any solid waste at the Site.

As EPA is aware, the Missouri Department of Natural Resources issued MRT a General Beneficial Use Exemption ("GBUE") that authorizes the beneficial use of fly ash at sites throughout the state subject to certain conditions. Contrary to what EPA asserts in Paragraph 14 of the Proposed Consent Order, MRT's GBUE does NOT require MRT to "avoid placement of the CCR where there is potential for it to come into direct contact with . . . surface water bodies." Rather, this is an obligation of the end user of the CCR. Kleinschmidt Trucking ("Kleinschmidt") was authorized by Mr. Coleman to obtain fill material for his site to raise the grade of the Site. Prior to agreeing with Kleinschmidt that the CCR could be deposited at the Site, MRT so advised Mr. Coleman, the end user, of his obligations and provided him a copy of the "Guidance for End Users for the Beneficial Use of Coal Combustion Byproducts" dated April 2002 ("Guidance") as required by MRT's GBUE. It was Mr. Coleman, and not MRT, who was responsible for ensuring that the proper permits were obtained and that the material was properly placed on the Site all as described in the Guidance.

Moreover, MRT never contracted with Kleinschmidt to dispose of the material at the Site. Rather, MRT contracted with Kleinschmidt for excavation and transportation services. Kleinschmidt chose the location where this material was deposited, and Kleinschmidt (along with Mr. Coleman) determined how the material was placed at the Site. MRT did not handle the material nor did it transport or dispose of the material at the Site. In fact, MRT was never aware that wetlands or open waters were allegedly impacted by Kleinschmidt and Colman's placement of the material on the Site until notified of this matter in 2010.[1] Furthermore, it is clear from the documents we have reviewed that any alleged filling activities began at the Site more than ten years before CCR ever came to the Site. All such activities were conducted with valid local land disturbance permits.

Although the legal standards are somewhat different between the CWA and RCRA, both statutes require EPA to demonstrate active involvement in the activities leading to the violations.[2] Here, the underlying facts remain unchanged -- MRT had no role in the decision-making process concerning how, when or where the CCR materials were handled, stored, treated or disposed of nor did MRT exercise control over the acts that EPA alleges resulted in CCR being deposited in a stream or wetland. Therefore, under RCRA, MRT did not "contribute" to the handling, storage, treatment or

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[1] According to the owner, historically the Site was farmed. While there has been periodic flooding during heavy rain events (mostly since the mid-1990s likely due to changes in local flood control elements), there is no evidence of open water or wetlands at the Site.

[2] Liability under the CWA requires, at a minimum "either (1) performance, or (2) responsibility for or control over performance of the work, in the absence of the necessary federal permit." United States v. Board of Trustees of Fla. Keys Comm. College, 531 F.Supp. 267, 274 (S.D.Fla.1981); United States v. Lambert, 915 F.Supp. 797, 802 (S.D.W.Va.1996); In re Carsten, 211 B.R. 719, 730 (U.S. Bankr. Ct. D. Mont. 1997). Similarly, "contributor" liability under RCRA requires evidence that the alleged defendant was actively involved in, or had some degree of control over, the waste disposal process. Hinds Investments, L.P. v. Angioli, 654 F.3d 846, 850 (9th Cir. 2011).

disposal of a solid waste that is presenting an imminent and substantial endangerment to human health or the environment.

Any settlement of this matter will have to account for MRT's minimal role in the activities that led to this enforcement action.

In order to prevail under RCRA, the United States must establish that (1) the defendant is contributing to or has contributed to such handling, storage, treatment, transportation or disposal of a waste; (2) the site presents an imminent and substantial endangerment to health or the environment; and (3) the endangerment stems from the handling, storage, treatment, transportation or disposal of a solid or hazardous waste.

In order to establish liability, the Proposed Consent Order makes the following allegations:

- Between October 2004 and September 2009, Respondent Ameren Missouri contracted with Respondent MRT to secure locations where CCR generated by Ameren Missouri's Rush Island plant could be disposed. (Proposed Consent Order at ¶ 18)
- Between October 2004 and September 2009, Respondent MRT contracted with Respondent Kleinschmidt Trucking, Inc., to transport and dispose of CCR at the Site. During that time, approximately 95,000 tons of CCR from Ameren Missouri's Rush Island Power Plant were disposed of at the Site. (Id. ¶ 19)
- Resource maps and aerial photography indicate that, prior to the disposal of CCR, the Site contained an unnamed tributary to Plattin Creek and forested wetlands. (Id. ¶ 21).
- Respondents are responsible for the handling, storage, treatment, transportation or disposal of solid waste, as described in Section 7003(a) of RCRA, 42 U.S.C. § 6973(a). (Id. ¶ 55b)
- Respondents have contributed to the handling, storage, treatment, transportation, or disposal by contracting for, and executing, the transportation and disposal of CCR from Ameren Missouri's Rush Island Power Plant to the Rotary Drilling Supply, Inc., Site. (Id. ¶ 55e).

EPA's recitation of the facts and legal theories identified above as well as throughout the Proposed Consent Order are not supported.

Foremost, contrary to the allegations in the Proposed Consent Order, MRT did not "contribute" to the handling, storage, treatment, transportation, or disposal of a waste. Courts have made it clear that RCRA liability requires "active human involvement" or "substantial affirmative action" contributing to waste disposal, together with some degree of "continuing control" over the disposal. Hinds, 654 F.3d at 851. Hence, in order for MRT to be held liable as a "contributor", EPA must prove that MRT was actively involved in or had some degree of control over the handling, storage, treatment or disposal of the CCR. As we have stated in the past, MRT had no involvement in, responsibility for or control over such actions that have allegedly resulted in the imminent and substantial endangerment.

MRT did not enter into contracts to secure locations for the disposal of CCR. MRT paid Kleinschmidt to excavate the fly ash from the Ameren Plant and place it off-site in accordance with

MRT's GBUE. Kleinschmidt (who had a long history of taking fill to the Site) identified the Rotary Drilling site and approached MRT with the proposal to transport and deposit fly ash to be used as structural fill in order to raise the elevation of the Site. The fly ash was provided at the volume requested by Kleinschmidt, who then handled the materials and delivered them to the site owned by Rotary Drilling. Kleinschmidt and/or Rotary Drilling personnel determined the placement of the structural fill.

We also note that there is no evidence that fly ash was actually deposited in a wetland or stream. Consistent with its GBUE, in late 2004, MRT inspected the site and provided the owner with the proper information concerning beneficial use of fly ash as required. The MRT employee did not observe any open waters, wetlands or streams at the Site, and the owner was informed of the proper use of this material. A comparison of the dated Google Earth images provided by EPA indicates that Rotary Drilling had substantially altered the topography of the site well in advance of the application of the CCR. Indeed, it is clear from the photos provided by EPA that in 2004 the site was dry ground and the CCR was being applied over other fill material.[3] In the end, MRT acted appropriately and consistent with its GBUE.

We note that the October 18, 2010 letter from Rotary Drilling to EPA makes clear that there were many sources of material at the site. For example, the City of Festus, City of Crystal City, City of Herculaneum, City of Pevely, and the Missouri Department of Transportation placed fill at the Site starting in 1993.[4] According to Rotary Drilling, both municipalities continued to place fill on the Site until "a couple of months" before that letter was written. At a minimum, EPA must undertake further investigation to determine other potential sources of material at the Site given the long history of other materials being deposited there. [5] Obviously any settlement will have to include the participation of these municipalities, other sources of fill, and the state Department of Transportation in light of their roles.

We have not had the opportunity to undertake a detailed technical analysis of EPA's site inspection data. However, we note that fly ash is commonly used as structural fill without resulting in an endangerment to health or the environment. On the other hand, it is clear that other materials have been deposited at this site since 1993 and there are other potential sources of contamination.[6] And, the CCR appears stable. Therefore, we question EPA's underlying theory of substantial endangerment from the CCR.

Finally, it is our understanding that EPA wants both a short-term plan addressing soil erosion and sediment controls to prevent alleged migration of CCR-related contaminants off-site and a long-term plan that abates the impacts due to the placement of the CCR. As described above, MRT has a

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[3] MRT does not concede that the Google Earth images demonstrate conclusively that the Site ever had jurisdictional waters on it.

[4] MRT was not named by Rotary Drilling as a party that placed fill material at the Site.

[5] We understand that shot rock from a quarry, waste concrete, gypsum, soil and CCR from other locations were brought to the Site.

[6] As EPA is likely aware, there are two stormwater pipes (one on the northern edge of the Site and one on the southern end) that transfer runoff from the highway to the rear of the Site that ponds in an area adjacent to the railroad right-of-way (which itself is a potential source of pollution). Furthermore, there is a concrete plant adjacent to the Site that appears to have a history of washing out its vehicles into the area sampled by EPA.

sufficient cause defense to EPA's Proposed Consent Order. Notwithstanding, MRT is willing to explore with other parties that brought material to the Site a remediation solution that involves leaving the structural fill in place while managing the stormwater at the site (thereby preventing any CCR and any other material from migrating to any adjacent waterbodies).

Having visited the site with our consultant, we believe that the fill material is relatively stable and that CCR is unlikely to be eroding or otherwise leaving the Site. The Site could be stabilized further with the addition of soil and a vegetative cover. The owner may be able to reduce the grade of the sides and add stone or other materials for further stabilization. The current drainage patterns could be altered to reduce the velocity and amount of stormwater leaving the Site. We are prepared to offer technical assistance towards such a plan. It is our understanding that your office will be providing us conceptual information concerning a plan to stabilize the site. We look forward to receiving this information.

Sincerely,

Rafe Petersen

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